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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

NO. 75-273 1

DONN CLARK,

Petitioner,

v.

LILLY MAE ONIE LEE WHITELAW HILLIARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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The Petitioner, Donn Clark, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on May 28, 1975.

OPINIONS BELOW

The unreported opinion of the Sixth Circuit is appended as Appendix A, and the unreported memorandum opinion of the United States District Court for the Western District of Tennessee, Eastern Division, is appended as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit sought to be reviewed was entered on May 28, 1975. Jurisdiction is invoked under 28 U.S.C., §1254(1). The basis for jurisdiction in the Court of first instance is 42 U.S.C., §1983, 1985.

QUESTIONS PRESENTED FOR REVIEW

1. May compensatory damages be recovered against a law enforcement officer for a term of confinement imposed by the judgment of a court of competent jurisdiction upon jury trial and felony conviction upon the ground that the imprisoned party seeking damages was deprived of due process of law by the officer's evasive, misleading and deceptive testimony during the course of the criminal trial?

2. May conviction and confinement pursuant to the judgment of a court of competent jurisdiction be said to have been proximately caused and caused in fact by evasive, misleading and deceptive testimony of a law enforcement officer during the course of the criminal trial so as to warrant recovery of compensatory damages for the confinement in favor of the confined party and against the law enforcement officer?

3. May evasive, misleading and deceptive testimony by a law enforcement officer during the course of a criminal trial be said to violate a criminal defendant's constitutional rights so as to warrant recovery of compensatory damages against the officer for conviction and confinement.

4. Under the facts of the instant case was the testimony of the defendant Clark, a law enforcement officer, such as to constitute a violation of Mrs. Hilliard's constitutional rights and warrant recovery in favor of Mrs. Hilliard and

against Clark for conviction and confinement at the hands of a court of competent jurisdiction?

5. Does a law enforcement officer have a constitutional duty independent of that of the prosecuting attorney to take affirmative steps to have evidence which may be favorable to a criminal defendant made available to or brought to the attention of the criminal defendant for purposes of trial?

6. Is evidence which has a dual capacity of impairing the State's theory on the one hand and impeaching the testimony of the criminal defendant on the other hand "favorable to the defendant" so as to burden the State or law enforcement officers to make such evidence available to a criminal defendant for trial?

7. May factual findings made by a district court be disturbed upon appellate review in the absence of the charge that such findings are "clearly erroneous"?

Questions 1, 2, 3, 4, 6, and 7 were answered by the Court of Appeals for the Sixth Circuit in the affirmative. Question 5 was answered in the affirmative by implication.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. 1983:

"§1983. Civil action for deprivation of rights

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

42 U.S.C. 1985:

"§1985. Conspiracy to interfere with civil rights– Preventing officer from performing duties

". . . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived or having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators." (Pertinent part only quoted.)

United States Constitution

Fifth Amendment

"No person . . . shall be deprived of life, liberty or property without due process of law."

Fourteenth Amendment

"No State shall . . . deprive any person of life, liberty or property without due process of law."

STATEMENT OF THE CASE

This petition grows out of an action brought by Mrs. Hilliard in the United States District Court for the Western District of Tennessee, Eastern Division, at Jackson under 42 U.S.C. Sections 1983, 1985, against District Attorney General Williams and Clark, an Agent of the Tennessee Bureau of Identification. The complaint charged that the defendants jointly and severally violated the due process rights of Mrs. Hilliard and thereby caused her to be con-

victed of murder in the second degree and consequently confined in the State penitentiary for approximately one year. The District Court awarded nominal damages in the amount of One Dollar each against Williams and Clark and taxed Williams with the costs. All parties appealed.

The Court of Appeals reversed and remanded with directions for the District Court to determine the amount of compensatory damages to which Mrs. Hilliard is entitled as a result of her conviction and confinement and to enter judgment accordingly.

The Sixth Circuit held ..... that the testimony of Clark at the 1970 murder trial was, as a matter of fact, evasive, misleading and deceptive and had the effect of denying Mrs. Hilliard her constitutional right to due process; that Clark's testimony proximately caused and caused in fact Mrs. Hilliard's conviction and consequential confinement; and that Mrs. Hilliard is entitled to recover compensatory damages of Clark and Williams for her conviction and confinement. As to the defendant Williams the appellate court held that he was guilty of suborning the testimony of Clark and of suppressing evidence favorable to Mrs. Hilliard.

While this petitioner does not necessarily agree with all of the facts found by the District Court, he concedes that they are not clearly erroneous and should be accepted; and so for a detailed account of facts and details material to consideration of the questions presented, reference is made to the findings of the District Court which are included in the appendix at pages 18a through 37a. One exception lies in the finding that the plaintiff testified at the 1970 trial to the effect that the spots on her jacket *might* be hog blood. In this regard the record clearly shows that the plaintiff testified that the spots *were* hog blood. (Trial Exhibit 2, Page 129).

REASONS FOR GRANTING THE WRIT

This writ should be granted because the Sixth Circuit Court of Appeals has decided several important questions of law which have not but should be settled by this Court; and the Sixth Circuit Court of Appeals has rendered a decision in conflict with that of the Seventh Circuit Court of Appeals (*Duncan v. Nelson*, 466 F.2d 939, *certiorari denied* 409 U.S. 894, 93 S. Ct. 116, 34 L. Ed. 152).

FIRST, SECOND & THIRD QUESTIONS

The Sixth Circuit has held in this case that during the course of Mrs. Hilliard's 1970 murder trial, defendant Clark gave testimony which was evasive, misleading and deceptive and had the effect of denying Mrs. Hilliard her constitutional right of due process; that Clark's misconduct in this regard proximately caused and caused in fact Mrs. Hilliard to be convicted and consequentially confined; and that Mrs. Hilliard is entitled to recover of both defendants compensatory damages for her conviction and confinement. The Sixth Circuit opinion is not entirely clear as to whether or not Clark was determined to be guilty of suppression of evidence favorable to Mrs. Hilliard in violation of her constitutional rights.

Broken down further, this decision seems to be authority for the following propositions of law:

(a) A cause of action may be stated by averment(s) that the plaintiff (civil) served a period of confinement pursuant to conviction and judgment of a court of competent jurisdiction; and that the defendant (civil) was guilty of misconduct which proximately caused and caused in fact the conviction and consequential damages.

(b) Proximate cause in such cases may be established by proof (by preponderance) that the conviction and confinement were foreseeable consequences of the misconduct; and cause in fact may be established by proof (by preponderance) that the misconduct was a substantial factor and material element in bringing about the conviction.

(c) Actions of a like kind would also lie at common law because the misconduct would certainly be tortious and the common law would afford at least compensatory relief to the victim for all damages proximately caused or caused in fact by such misconduct.

(d) Such actions would not be limited to situations where the conviction was eventually followed by acquittal as in the instant case (even though subsequent acquittal would be a matter of probative value) because the very misconduct complained of may be continuing to prevent eventual justice by acquittal.

(e) Such actions would not be limited to criminal convictions for certainly the victim who has been deprived of a property right by civil judgment should have an actionable claim under the circumstances hereinbefore described.

(f) The general rule that has prevailed in this country that the judgment of a court of competent jurisdiction carries with it the integrity to sever the causal chain between matters precedent and matters subsequent is abandoned.

The reascning of the Sixth Circuit opens up a vast new area of liability and litigation. By way of example, it could safely be said that many if not most of all persons convicted of crime upon contested trial take the position that their conviction was brought about by the wrongdoing

of others during the course of the criminal process. Some of the more common of the long list of complaints are perjury, illegal search and seizure, unlawful arrests, unlawfully obtained confessions, and perhaps the most common of late, incompetent representation by counsel. A charge that the wrongdoing caused the conviction and confinement would suffice to gain the civil plaintiff his day in court and an opportunity to present his case to the trier of fact. Regardless of the merits of the matter, the accused party would have the burden of defending himself and would often be exposed to substantial damages such as in the case of an extended confinement. While one could hardly argue with the principle that a wrongdoer should be required to compensate his victim, the evils of such a theory so far outweigh the merits that its adoption would frustrate rather than serve the cause of justice. Some of the flaws that come quickly to mind - - -

(a) The concept presupposes an absence of integrity in our criminal justice process and stands for the incongruous proposition that truth not reached in the criminal process will be reached in the subsequent civil process;

(b) The principle that the judgment of a court of competent jurisdiction does not carry sufficient weight to be a causal cutoff between matters precedent and matters subsequent is in and of itself a damaging blow to the cornerstone of our system;

(c) Injustice to the civil defendant forced to defend such actions will likely be the rule rather than the exception;

(d) Every action will set into motion a series of subsequent actions because every factor playing a part in the outcome of a trial may be subject to test by subsequent civil litigation;

(e) There will be an understandable reluctance on the part of anyone to participate in any criminal proceeding because of the risk of being subjected to a subsequent lawsuit and exposure to substantial liability.

(f) The field of law enforcement will be almost a prohibitive occupation.

We respectfully submit that the principles laid down in this decision by the Sixth Circuit should be rejected; but if we are wrong certainly this is a matter that deserves consideration by this Court.

As a further ground for granting this petition, we respectfully submit that the instant decision of the Sixth Circuit is contrary to the Seventh Circuit decision of ***Duncan v. Nelson***, 466 F.2d 939, ***certiorari denied***, 93 S. Ct. 116, 409 U.S. 894, 34 L. Ed. 152. In this Seventh Circuit case Duncan was found guilty of murder in 1966 and sentenced to thirty years' imprisonment but in 1968 the Supreme Court of Illinois reversed and remanded on the ground that a confession obtained by police officers was involuntary and erroneously admitted into evidence. The circumstances under which the confession was obtained were extremely aggravated. Upon retrial in 1968 the confession was excluded and Duncan acquitted. He subsequently filed suit in the District Court against the officers for damages pursuant to several civil rights statutes; and he averred that the wrongful actions on the part of the officers in obtaining the confession constituted a violation of his civil rights and was the proximate cause of his conviction and consequential confinement for about nine years. The District Court dismissed the complaint and Duncan appealed to the Seventh Circuit Court of Appeals. The appellate court agreed with the District Court that the plaintiff could not recover damages arising out of his con-

viction and resultant confinement but the case was reversed because of error by the District Court in treating the claim as one for damages attributable solely and alone to conviction and confinement without affording the plaintiff an opportunity to present proof of damages relative to his mistreatment in connection with the physical abuse involved in the taking of the confession. The reversal by the appellate court on the aforesaid ground in no way distinguishes *Duncan* from the case at bar because it has been clear from the outset that Mrs. Hilliard was seeking damages attributable solely and alone to her conviction and confinement. In upholding the District Court's dismissal of the complaint insofar as the proximate cause question was concerned, the Seventh Circuit found among other things that it could not have been foreseen by the officers that the confession would have been admitted into evidence; and that even if the admission of the confession was foreseeable that it would have been speculation and conjecture to conclude that the plaintiff would have been acquitted in the absence of the tainted evidence.

The appellate court in *Duncan* was of the opinion that the police officers could not have foreseen that the criminal trial court would have allowed the confession to have been improperly received in evidence; or to put it another way, that the officers had a right to rely upon the judicial process to function properly and to reject the evidence if improper. This reasoning which is certainly sound is most fitting to the case at bar. Clark at the time of the 1970 trial had been an officer of the Tennessee Bureau of Identification for about ten months and this was his first homicide case. He could not have foreseen that as between the District Attorney, defense counsel, and the Court that disclosure of the F.B.I. report and related matters would not have been pursued and accomplished if due proc-

ess so required. In this connection we call to the Court's attention some of the pertinent undisputed facts:

(a) The jacket as well as the curtains were present at the preliminary hearing on February 27, 1970 and both the District Attorney General and defense counsel were present; both were aware or should have been aware that the items were to be scientifically analyzed; and both knew or should have known that a significant report concerning the items would be forthcoming.

(b) The F.B.I. report in question was received by Clark on or about March 26, 1970 and shortly thereafter brought to the attention of the District Attorney General.

(c) The report was considered by Clark and the Carroll County Sheriff to be inconclusive particularly in view of the fact that Mrs. Hilliard was herself taking the position (and did in fact testify at the trial) that the spots on the jacket were animal blood. For that reason, Clark resubmitted the jacket on April 28, 1970, ***but at the time he was unaware that the trial would be held on May 12***. The District Attorney General knew that the items had been resubmitted.

(d) Mrs. Hilliard was arraigned on May 8, 1970, at which time the trial date of May 12, 1970 was set. No inquiry was made of Clark by anyone concerning the jacket, curtains or report relative thereto; and no one requested of Clark that the items and report be available for trial.

(e) Immediately prior to the first criminal trial on May 12, 1970, the District Attorney General told Clark who was to be a witness not to bring up the report unless it was specifically called for.

(f) Defense counsel made no effort through discovery procedures to discover the results of the analysis or to assure the availability of the items or report for trial even though he knew or should have known of the analysis, the report and the significance of same.

(g) During the course of the trial of May, 1970, the issue concerning the jacket and report became heated but even then Clark was not advised to divulge the existence of or contents of the report.

Applying again the reasoning of *Duncan*, even if it was or should have been foreseeable to Clark it would be a matter of sheer speculation to say that his testimony proximately caused Mrs. Hilliard's confinement. The Seventh Circuit stated that even if the admissibility of the confession was or should have been foreseen by the officers that it was still not the proximate cause of the conviction and confinement. We quote:

> "In addition, to conclude that the number of years that the plaintiff spent in confinement was a proximate result of this conviction, which was a proximate result of admission into evidence of this confession, which in turn was a proximate result of defendant's unlawful conduct in obtaining that confession, is not only extremely tenuous but makes any award of damages on that basis impossible."

In the instant case it is, to say the least, tenuous to conclude that Mrs. Hilliard's year in prison was the proximate result of the conviction, which was the proximate result of the evidentiary errors which were the proximate result of Clark's wrongdoing.

FOURTH QUESTION

The Court of Appeals found as a matter of fact that Clark gave misleading and evasive testimony which caused the conviction and confinement. The overall effect of his testimony was that Mrs. Hilliard's jacket had spots on it which appeared to be blood; and this testimony was true in fact. If the testimony was evasive it was because Clark failed to mention the F.B.I. report showing "no blood identified." The Court in finding causation apparently gave no consideration to the fact that the same testimony given by Clark was also given by another witness (Sheriff Donald Akin) so that the evidence would have been before the jury even if Clark had not testified; it gave no consideration to the other evidence presented at the trial indicating the guilt of Mrs. Hilliard; and it gave no consideration to the fact that the F.B.I. report was impeaching to the testimony of Mrs. Hilliard. We respectfully submit that the finding and conclusion of the Court of Appeals of causation without consideration of other evidentiary factors was error and a matter of such importance as to warrant consideration of this Court.

FIFTH QUESTION

The Sixth Circuit decision implies that a law enforcement officer has a constitutional duty independent of that of the prosecuting attorney (who has charge of the case) to take affirmative steps to have evidence which may be favorable to a criminal defendant made available or brought to the attention of the defendant for purposes of trial. The several decisions of this Court on this point make reference to "the prosecution" or the "prosecutor". We do not read these decisions as placing any such burden on a police officer. (*Miller v. Pate*, 386 U.S. 1, 87 S.Ct. 785, 17

L.Ed. 690; *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 215; *Giles v. Maryland*, 386 U.S. 66, 87 S.Ct. 793, 197 L.Ed. 737. The implication being present, we respectfully submit that this Court should pass on the matter.

SIXTH QUESTION

The fact is that the F.B.I. report allegedly suppressed would have impeached the testimony of Mrs. Hilliard because she had taken the position and in fact testified that the spots on her jacket consisted of hog blood. The report, if taken to be an affirmative statement that no blood was on the jacket would by its very nature have impeached the testimony of Mrs. Hilliard on a very crucial matter and her credibility as a witness was indeed critical. It is true that the absence of blood on the jacket would have been some impairment to the State's case but to say the least, the report had a dual capacity. The question then is whether or not such evidence is to be considered "favorable to the defendant" so as to burden the State or law enforcement officer to make such evidence available to a criminal defendant. We respectfully submit that this is another matter that should be passed upon by this Court.

SEVENTH QUESTION

Upon appeal Mrs. Hilliard made no charge that the factual findings of the District Court were clearly erroneous as is required by Rule 52 of the Federal Rules of Civil Procedure. We thus have the question of whether or not under the circumstances the appellate court was at liberty to disturb the factual findings. Perhaps the most significant factual finding by the trial court was that Clark was guilty of no wrongful act or omission which proximately

caused the conviction and confinement. The trial court in making this decision considered among other things the vast amount of other evidence indicating the guilt of Mrs. Hilliard and also the fact that the F.B.I. report would have been impeaching to her testimony. The Court of Appeals seems to have overturned this finding without giving consideration to the other evidence presented. In other words, the Court of Appeals has held on the causation in fact question that if the testimony of Clark and the nondisclosure was a substantial factor and material element causation would be presumed as a matter of law regardless of what other evidence there may have been of Mrs. Hilliard's guilt. Plainly put, it seems that the Court of Appeals has found that a fact exists as a matter of law. We respectfully question this and submit that it is a matter that should be passed upon by this Court.

CONCLUSION

PREMISES CONSIDERED, PETITIONER PRAYS:

1. That a writ of certiorari, for which this is the first application, issue from this Court to the United States Court of Appeals for the Sixth Judicial Circuit directing said Court and the Clerk thereof to certify and transmit to this Court the entire record of the proceedings in this cause for review.

2. That this case be placed upon the docket of this Court for argument and that the judgment of the Court of Appeals for the Sixth Judicial Circuit be reversed and that the errors complained of by petitioner herein be corrected by this Honorable Court.

3. That the petitioner have such other further and general relief to which he may be entitled.

Respectfully submitted,

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APPENDIX A

Nos. 74-1356-58

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

LILLY MAE ONIE LEE WHITELAW HILLIARD,
Plaintiff-Appellant,

v.

JOHN L. WILLIAMS and DONN CLARK,
Defendant-Appellees.

APPEAL from the United States District Court for the Western District of Tennessee, Eastern Division.

Decided and Filed May 28, 1975

Before: PHILLIPS, Chief Judge, EDWARDS, Circuit Judge, and O'SULLIVAN, Senior Circuit Judge.

PHILLIPS, Chief Judge. This appeal grows out of an action brought by plaintiff Hilliard under 42 U.S.C. §§ 1983, 1985 against District Attorney General John L. Williams and against Donn Clark, an agent of the Tennessee Bureau of Criminal Identification. The complaint alleged that the defendants withheld exculpatory evidence and presented false and misleading testimony at Mrs. Hilliard's criminal trial on the charge of murder. After a nonjury trial,

the District Court awarded nominal damages of $1 each against Williams and Clark and costs against Williams. All of the parties appealed to this court. For the reasons stated below, we reverse and remand for further proceedings.

In late 1969, Mrs. Hilliard came to Tennessee from her home in Indiana to obtain her share of land that she held in common

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with her aunt, Vina Price. Ernie Price, the husband of Vina Price, disputed Mrs. Hilliard's claim to the land, and Mrs. Hilliard retained an attorney to protect her interest.

On February 19, 1970, Ernie Price died from the effects of two axe blows and a shotgun wound to the head and mouth. It appeared that Mr. Price had been murdered inside his home and the body thereafter dragged outside. One of Mrs. Hilliard's shoes was found near the scene of the crime. According to Mrs. Hilliard, just before the murder Mr. Price had threatened her with a shotgun, and she fled toward a neighbor's house, losing the shoe in the process. She claimed to have heard a shotgun blast while running. Upon arriving at the neighbor's home, she telephoned her attorney, who in turn called the authorities.

Later that day Mrs. Hilliard was arrested. Defendant Clark, who had been assigned to investigate the murder, seized as evidence a curtain from the Price home and the jacket Mrs. Hilliard was wearing when arrested, both of which contained small stains that Clark thought might be blood. Clark sent the curtain and the jacket to the F.B.I. laboratory in Washington for analysis of the stains. In late March of 1970, the F.B.I. returned both items and

submitted a report stating: "No blood was identified on Q1 [jacket] or Q2 [curtain]." Agent Clark considered the report inconclusive and sent the jacket and curtain to Nashville to be forwarded back to the F.B.I. for further analysis. Unknown to either defendant, the jacket for some reason never left Nashville. On May 28, 1970, the F.B.I. reported that the stains on the curtain were composed of paint or varnish.

Before Mrs. Hilliard's murder trial began on May 12, 1970, the defendants discussed the first F.B.I. report at least twice. Williams instructed Clark not to mention the report in his testimony unless specifically questioned about it. Defendant Williams did not reveal the contents of the report to Mrs. Hilliard or to her attorney. To the contrary, in his capacity as

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prosecuting attorney he allowed the following testimony to be elicited from Agent Clark without correction or explanation:

DIRECT EXAMINATION BY GEN. SMITH:

Q 66 Did you proceed to inspect the living room furniture then?

A Yes sir, I found what looked to be blood stains on the arm of the arm chair, on the north side of the house, sort of behind the stove, —

Q 67 All right, go ahead?

A Also found blood stains on the floor in front of the chair, and some on the curtains behind the stove, then on the back of the couch on the north wall of the living room, the wall looked wet, as if it had been washed behind the couch there.

Q 108 Now, did the defendant continue to remain

in the Sheriff's car while you all made the investigation?

A Yes, she stayed in the back seat of the sheriff's car.

Q 109 Now, did you take a picture of her?

A Yes. (shows photo)

Q 110 Was that the way she was dressed when you took the picture of her?

A Yes, that was made at the jail.

Q 111 What kind of coat is that?

A A blue nylon windbreaker type coat.

Q 112 All right, did you find any blood stains on that?

A Yes sir, I found some spots on it.

Q 113 What did they appear to be?

A They appeared to be blood stains.

Q 114 Where were they?

A They were on the right tail of the coat, right front of the coat.

CROSS-EXAMINATION BY MR. MADDOX:

Q 55 Was there any indication of any blood stains on the floor where the water was?

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A No sir, —on the edge of where the water was is where you could see the blood stains.

Q 56 Now, how do you know it was blood stains?

A That is what it looked to me like.

Q 57 Did you have it examined to see what it was?

A No, I didn't have it analyzed.

Q 58 Did you have anything analyzed off the couch to determine if it was blood?

A No sir.

Q 59 Did you have the curtains analyzed?

A I sent them off to the FBI lab and they aren't back yet.

Q 60 You don't have the curtains back?

A No, sir.

Q 61 Lets talk about this jacket, —you put in some very dangerous evidence against the defendant, by saying she had blood-stains on her jacket, —do you know they were blood stains?

A I said they looked like blood stains.

Q 62 How large were they, Mr. Clark?

A They were small, —

Q 63 Pin point weren't they?

A No, they were bigger than pin point?

Q 64 Well, were they as large as a dime?

A No sir, not as large as a dime.

Q 65 Were they as large as half a dime?

A Yes sir, —

Q 66 Now, Mr. Clark, be sure about it?

A Yes, they were as large as half a dime.

Q 67 How many spots were on the jacket?

A About 3 or 4, scattered, —

Q 68 Scattered where?

A Up on the right side of the tail of the coat.

Q 69 Were there any on the back?

A I didn't see any.

Q 70 Mr. Clark, where is that jacket today?

A At the FBI Lab in Washington.

Q 71 Why didn't you make it available here for us

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so that the jury could see those spots on that jacket and determine if it was blood?

A They just didn't send it back.

Q 72 Have you had any reports that that was human

blood on that jacket?

A No, not at this time.

Q 73 But you don't know what was on that jacket do you?

A No, just what it looks like, —

Q 74 Well, we don't want your opinion, we want to know if you know what was on that jacket, —

GEN. SMITH: We are going to object to a question like this, —he can give his opinion, —

THE COURT: I think his opinion is all he could give, —

MR. MADDOX: I asked him if he knew, —

THE COURT: He can ask him whether he knows or not, he can state, —the only way he would know would be proof of what he actually saw, —

Q 75 Do you know if that was blood stains or not?

A Not through a chemical analysis I wouldn't know,—

Q 76 So you do not know?

A No sir, I don't.

Later in the trial, Attorney General Williams himself questioned another law officer who had participated in the investigation, and the following testimony was given:

Q 6 All right, just describe this jacket that Onie Lee was wearing?

A There was blood spots on the right side of the jacket.

Q 7 They appeared to be blood stains to you?

A Yes sir.

Mrs. Hilliard testified on her own behalf to the effect that if there was any blood on her jacket, it was hog blood and not human blood.

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Mrs. Hilliard was convicted of second degree murder and sentenced to twenty years' imprisonment. On April 15, 1971, the Tennessee Court of Criminal Appeals reversed the conviction on the grounds that the evidence was "unconvincing" and insufficient to support the verdict and that some gruesome photographs of the victim had been exhibited to the jury. *Hilliard v. State*, No. 3 (Tenn. Crim. App., Apr. 15, 1971, unreported). Although the court did not pass on the propriety of withholding the F.B.I. laboratory report, it did discuss the effect of the testimony about the stains on Mrs. Hilliard's jacket:

> Of quite devastating impact tending to show guilt was the fact that the defendant had what appeared to be blood stains on her jacket. The State introduced proof of this, and then it was revealed that the jacket itself had been sent to the F.B.I. laboratory in Washington, D.C. for chemical analysis and, although some three months had passed since the jacket had been taken from the defendant, it had not been returned for use at the trial; nor was there any information available to shed light on the vital issue of whether the blood was human as theorized by the State or hog as theorized by Mrs. Hilliard.

Although, as aforesaid, no opportunity was allowed the trial court to correct any error that might have been involved in allowing the State's proof concerning the blood being on the jacket when it developed that the jacket itself was, by State action, unavailable, and thus we cannot consider the propriety of the court's rulings on the objections made during trial; the impact of this testimony does enter into our decision. The proof

offered by the State relative to this blood was circumstantial as was all the other. But here there was an opportunity to make available to the jury direct proof, in the face of the defendant's testimony that the blood was that of a hog, that would have supported one theory and discredited the other. Either the blood was human or swine. If it had been established as human, this would have left little

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room for doubt that the defendant was not telling the truth in her explanation of how she got blood on her clothing. If it developed that the blood was from a hog, this would have proved conclusively that she was telling the truth, in this particular at least.

Certainly the two hypotheses suggested by the proof of blood on the jacket—one tending strongly to suggest guilt, the other tending to support the theory of the defendant—are equally reasonable. In its present condition the evidence offered by the defendant buttressed by the presumption of innocence never overcome by sufficient proof preponderates against the verdict.

Mrs. Hilliard was retried and acquitted in May 1971, having served about one year in the penitentiary. At the second trial she had the benefit of the F.B.I. report, which was duly admitted into evidence.

Mrs. Hilliard filed her complaint in the District Court on May 11, 1971, essentially alleging the facts as outlined above. Initially, the court granted defendant Williams' motion to dismiss on the basis of quasi-judicial immunity. In an earlier appeal, we reversed the dismissal and remanded for trial, holding that the complaint charged Attorney General

Williams with acts that were "outside his quasi-judicial capacity and beyond the scope of 'duties constituting an integral part of the judicial process.'" *Hilliard v. Williams*, 465 F.2d 1212, 1218 (6th Cir.), *cert. denied*, 409 U.S. 1029 (1972).

On remand, the District Court conducted a nonjury trial and set forth findings of fact and conclusions of law in an unreported memorandum opinion. In essence, the District Court found that Williams acted "unwisely and improperly" in failing to disclose the substance of the exculpatory F.B.I. report. The court apparently also held that Agent Clark did not fully discharge his duty to refrain from giving evasive or misleading testimony. Nevertheless, the court con-

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cluded that the defendants' conduct had not deprived Mrs. Hilliard of her constitutional rights and that it had not been shown that the defendants' acts were the direct and proximate cause of Mrs. Hilliard's conviction and incarceration. Despite its conclusions, the court awarded nominal damages of $1.00 against each defendant and taxed costs against Williams.

All of the parties now appeal from the judgment of the District Court. Plaintiff argues that she is entitled to more than nominal damages. Defendants insist that in view of the District Court's finding that plaintiff was not deprived of her constitutional rights, even a nominal award is unwarranted.

After a review of the record, we are unable to agree with several of the court's conclusions of law. In Conclusion No. 4, the District Court stated that Attorney General Williams "advised Donn Clark not to mention the report at

the first criminal trial unless specifically called for, and thus, we conclude that Clark acted under 'advice' of Counsel, Williams." It is unclear to us whether the District Court viewed Clark's reliance on Williams' advice as an effective defense in this civil rights action. Nevertheless, we think it plain that a law enforcement officer who knowingly gives evasive, misleading, and deceptive testimony during a criminal trial cannot escape civil liability that otherwise would attach merely because the prosecuting attorney instructed him to testify as he did. As the District Court pointed out, Clark was under an affirmative duty to refrain from giving evasive or misleading testimony, and the duty did not disappear when Williams advised Clark to avoid mention of the F.B.I. report.

In Conclusion No. 7, the District Court made the following statement:

> 7. Neither of the defendants jointly or severally suppressed any evidence, committed or suborned perjury, or otherwise committed any act or were guilty of any omission which deprived Mrs. Hilliard of any rights guaran-
>
> [9]
>
> teed her by the Constitution of the United States or any Federal statute.

We do not agree with the court's holding on this aspect of the case. Whether guilty or innocent, Mrs. Hilliard had a due process right to a fair trial. Defendant Williams withheld an F.B.I. report indicating that there was no blood on Mrs. Hilliard's jacket. Moreover, Williams failed to prevent or to correct deceptive and misleading testimony given by defendant Clark from which the jury could have

concluded that the jacket was stained with the victim's blood. Further, it appears that Williams actually instructed Clark to testify at least evasively, if not falsely. We believe that by these acts and omissions defendant Williams deprived Mrs. Hilliard of her constitutional right to a fair trial. *Miller v. Pate*, 386 U.S. 1 (1967). *See Giglio v. United States*, 405 U.S. 150 (1972); *Brady v. Maryland*, 373 U.S. 83 (1963); *Napue v. Illinois*, 360 U.S. 264 (1959). It follows that this defendant's conduct also amounted to an actionable violation of 42 U.S.C. §1983.

We hold that the acts and omissions of defendant Clark as outlined above also resulted in depriving Mrs. Hilliard of due process and her constitutional right to a fair trial, under *Brady v. Maryland, supra. See also United States ex rel. Moore v. Koelzer*, 457 F.2d 892 (3d Cir. 1972); *Kauffman v. Moss*, 420 F.2d 1270 (3d Cir.), *cert. denied*, 400 U.S. 846 (1970).

As an agent of the Tennessee Bureau of Criminal Identification, Clark was assigned to investigate the murder for which Mrs. Hilliard was convicted at her first trial and acquitted at her second trial. It was he who sent the jacket and curtain to the F.B.I. laboratory for analysis of the suspected blood stains, and later sent them back to Nashville to be forwarded to the F.B.I. for further analysis. In his testimony before the jury he violated his duty to give the complete truth and to avoid deceptive or misleading statements. Although Williams, the District Attorney General, was the official representative of the State of Tennessee in the prosecution of the case, Clark also played an active role in the prosecution.

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In *Brady*, the Supreme Court said:

> We now hold that the supression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

The principle of *Mooney v. Holohan* is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: 'The United States wins its point whenever justice is done its citizens in the courts.' 373 U.S. at 87.

Clark relies upon *Bryant v. Kentucky*, 490 F.2d 1273 (6th Cir. 1974), and *Hurlburt v. Graham*, 323 F.2d 723 (6th Cir. 1963). We are of the view that there are significant distinguishing features between those decisions and the facts of the case at bar.

We hold that the conduct of Clark also amounted to an actionable violation of 42 U.S.C. §1983. *Cf. Jones v. Perrigan*, 459 F.2d 81 (6th Cir. 1972).

In Conclusion No. 13, the following statement appears:

> 13. During the proceedings in question defendant Williams was acting within the scope of his duties as Attorney General and at no time did he go outside the scope of his duties as Attorney General in directing or

> commanding or ordering the investigating officers or witnesses to present false testimony.

This conclusion is plainly untenable. It is most emphatically not within the scope of a prosecuting attorney's duties to withhold exculpatory evidence and to direct witnesses to give

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misleading and deceptive testimony. *Hilliard v. Williams*, 465 F.2d 1212 (6th Cir.), *cert. denied*, 409 U.S. 1029 (1972); *see* ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-13, DR 7-103(B). The function of a criminal trial is to discover the truth, and to that end it is the prosecutor's duty to reveal pertinent information, not to hide it. *Brady v. Maryland*, *supra*, 373 U.S. 83, 87 (1963).

As the foregoing discussion indicates, we believe that defendants Williams and Clark violated §1983, for which Mrs. Hilliard is entitled to recover damages. *See Magnett v. Pelletier*, 488 F.2d 33 (1st Cir. 1973); *Basista v. Weir*, 340 F.2d 74, 87 (3d Cir. 1965); *Sexton v. Gibbs*, 327 F. Supp. 134, 142 (N.D. Tex. 1970), *aff'd*, 446 F.2d 904 (5th Cir. 1971), *cert. denied*, 404 U.S. 1062 (1972). The complaint, however, prayed for both punitive and compensatory damages. The award of punitive damages is a matter within the discretion of the trier of fact, and the scope of appellate review is accordingly narrow. *See Stolberg v. Board of Trustees*, 474 F.2d 485, 489 (2d Cir. 1973); *Donahue v. Staunton*, 471 F.2d 475, 482 (7th Cir. 1972), *cert. denied*, 410 U.S. 955 (1973); *Lee v. Southern Home Sites Corp.*, 429 F.2d 290, 294 (5th Cir. 1970). In this case we see no basis for disturbing the District Court's refusal to award punitive damages.

A more difficult question is presented by the lower court's failure to grant compensatory damages. The court concluded that Mrs. Hilliard had not shown a sufficient causal connection between the defendants' improper acts and her murder conviction and subsequent incarceration. In Conclusion No. 8, the District Court made the following statement:

> 8. It would amount to speculation and surmise for the Court to conclude that the absence (whether deliberate or otherwise) of the F.B.I. report of March 26, 1970, or the absence of the curtains and jacket, affected the outcome of the May, 1970, trial. There was considerable evidence to warrant a finding of guilty on the record in any event.

[12]

To the same effect is Conclusion No. 12:

> 12. Plaintiff has failed to show that any wrongful act of Clark or of Williams proximately and directly caused Mrs. Hilliard to be convicted of murder in the second degree at the May, 1970 trial or to suffer imprisonment on that account in view of other substantial variances in the proof adduced at the two trials.

Further, the District Court stated that the award of nominal damages was made despite "the failure to show that such mistaken or improper acts as and if involved on the part of either defendant were a direct and proximate cause of any imprisonment or damages."

In our opinion, Mrs. Hilliard has shown by a preponderance of the evidence that Attorney General Williams' and T.B.I. Agent Clark's wrongful acts and omissions were a proximate cause and a cause in fact of her conviction and

imprisonment pursuant to her conviction. Proximate cause, which must be distinguished from factual causation, frequently becomes an issue in negligence actions and usually is analyzed in terms of the foreseeability of the injury that actually occurred. *See Lancaster v. Montesi*, 216 Tenn. 50, 390 S.W.2d 217 (1965). *See generally* W. PROSSER, TORTS 244-90 (4th ed. 1971). Assuming the concept is applicable to this case, we believe that it presents no problem. Mrs. Hilliard's conviction and confinement were not only foreseeable consequences of the defendants' conduct, they were without doubt also the intended results.

It appears that this case really turns upon the issue of causation in fact. We therefore are faced with the question of whether Mrs. Hilliard sustained her burden of proving it to be more likely than not that Attorney General Williams' and T.B.I. Agent Clark's conduct was a substantial factor and a material element in bringing about her conviction and imprisonment. *See Lancaster v. Montesi*, 216 Tenn. 50, 390 S.W.2d 217 (1965); *Carney v. Goodman*, 38 Tenn. App. 55,

[13]

270 S.W.2d 572 (1954); W. PROSSER, TORTS 239-41 (4th ed. 1971). The District Court treated the question as one of law and answered it in the negative. We disagree.

As the Tennessee Court of Criminal Appeals noted, the testimony about blood on Mrs. Hilliard's jacket was "[o]f quite devastating impact." Such evidence would have been highly significant to a jury presented with a violent crime involving axe and shotgun wounds. Furthermore, the other evidence presented against Mrs. Hilliard was wholly circumstantial and sufficiently unconvincing that it could not

sustain a verdict of guilty under Tennessee law. It is also important that at the second criminal trial, when Mrs. Hilliard had the benefit of the exculpatory F.B.I. report, she was found not guilty. There were, to be sure, other differences between the two trials, and thus the subsequent acquittal in and of itself does not foreclose the causation issue in Mrs. Hilliard's favor. Nevertheless, the acquittal upon retrial is probative evidence tending to establish that Attorney General Williams' and T.B.I. Agent Clark's conduct was a cause in fact of Mrs. Hilliard's injuries.

No one can ever be certain that Hilliard would not have been convicted if defendants had acted properly in all respects. The law, however, does not place such a heavy burden on the plaintiff. This is a civil case, and plaintiff need only show by a preponderance of the evidence that defendants' conduct was a substantial factor in bringing about the injuries suffered. We are convinced that Mrs. Hilliard has met this burden.

On remand, the District Court should determine the amount of compensatory damages to which Mrs. Hilliard is entitled as a result of her conviction and one-year confinement in prison. This does not include imprisonment prior to conviction.

The judgment of the District Court is reversed and the case is remanded for further proceedings consistent with this opinion.

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The Supreme Court has granted certiorari in *Imbler v. Pachtman*, 500 F.2d 1301 (9th Cir. 1974), *cert. granted*, 43 U.S.L.W. 3465 (Feb. 24, 1975). It is suggested that

the District Court postpone further proceedings in the present case until after the Supreme Court has announced its decision in *Imbler*.

The costs of this appeal are assessed against John L. Williams and Donn Clark.

APPENDIX B

In The
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

FILED
NOV 2 1973

LILLY MAE ONIE LEE WHITELAW HILLIARD,
Plaintiff,

v.

JOHN L. WILLIAMS and DONN CLARK,
Defendants.

NO. 2073

MEMORANDUM OPINION

F A C T S

1. On about February 19, 1970, Ernie Price was murdered in Carroll County, Tennessee, and the plaintiff herein, Mrs. Hilliard, was charged with the crime. She was arrested on February 19, 1970, indicted on May 4, 1970, for murder in the first degree, arraigned on May 8, 1970, and tried on May 12 and 13, 1970. She was found guilty of murder in the second degree on May 13, 1970, and sentenced to serve twenty years in the State Penitentiary. Upon appeal to the Court of Criminal Appeals of Tennessee, the conviction was reversed and the case remanded; and upon retrial Mrs. Hilliard was found not guilty on May 12, 1971, and immediately discharged. Mrs. Hilliard was in

pretrial confinement in Carroll County, Tennessee, from February 19, 1970, to May 13, 1970, and was in state custody pursuant to her conviction from May 13, 1970, through May 12, 1971.

2. Defendant Williams is a District Attorney General for the 22nd Judicial Circuit which includes Carroll County, Tennessee, and pursuant to his duties represented the State of

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Tennessee in the case of the *State of Tennessee v. Lilly Mae Onie Lee Whitelaw Hilliard* in the Circuit Court of Carroll County, Tennessee, which criminal case is a basis of the present action. The defendant Donn Clark is an agent of the State of Tennessee, Bureau of Criminal Identification who was assigned to assist Carroll County authorities in the investigation of the death of Ernie Price.

3. The deceased, Ernie Price, was married to Vina Price, a sister of Mrs. Hilliard's deceased mother; and thus, Mrs. Hilliard and the deceased were neice and uncle respectively by marriage. Vina Price and Mrs. Hilliard's mother had inherited about seventy (70) acres of real estate in Carroll County, Tennessee, and they were apparently tenants in common, since Mrs. Hilliard took her mother's part. In December of 1969, Mrs. Hilliard came to Tennessee from her home in Elkhart, Indiana, to have her share of the real estate set aside to her; however, a dispute arose and persisted between Ernie Price and Mrs. Hilliard concerning the property. Ernie Price was claiming an interest in the real estate by reason of adverse possession or prescription contrary to the claim of Mrs. Hilliard. Mrs. Hilliard employed an attorney, Mr. Dwayne D. Maddox,

to pursue and protect her interest. She apparently remained in Carroll County until the matter could be settled.

4. On February 19, 1970, between about 10:00 A.M. and 12:00 Noon, Ernie Price was found brutally murdered with his body leaning against the back door of his home. He had a shotgun wound about the mouth, one or two severe axe type wounds about the head, any of said wounds being sufficient to have caused his death. The circumstances surrounding the crime strongly indicated that the

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murder had actually taken place inside the Price home and the body thereafter removed to the outside in an effort to conceal the true circumstances surrounding the homicide.

5. Mrs. Hilliard made both judicial and extrajudicial statements to the effect that immediately prior to the homicide that the deceased became enraged, threatened and chased her with a shotgun; that she ran from the home to the nearby home of the Nesbitt's; that while she was en route from the Price home to the Nesbitt home she heard a gun blast; and that upon reaching the Nesbitt home and upon the suggestion of Mr. Nesbitt, she contacted her attorney, Mr. Maddox. She did in fact call Mr. Maddox who in turn notified the authorities.

When Hilliard arrived at the Nesbitt home following her flight from the Price home as well as at the time of her arrest on the day of the murder, she was wearing a blue windbreaker type jacket that had upon it some small spots resembling blood. The local officers, including defendant Clark, theorized that the spots were the blood of Ernie Price; and they later learned from Mrs. Hilliard or her counsel that her position was that the spots, if blood at all,

were animal or hog blood. Clark, moreover, seized the jacket as evidence and likewise seized some curtains from inside the house of Ernie Price upon which there were spots resembling blood. On or about March 9, 1970, Clark forwarded the jacket and the curtains to the F.B.I. laboratory in Washington, D.C. for analysis to learn if the spots were blood, and, if so, whether the blood was human or animal. The F.B.I. report dated March 26, 1970, was received shortly after that date by Clark and indicates, "No blood identified on Q1 (jacket) or Q2 (curtains)." Clark also received the jacket

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and the curtains from the F.B.I. laboratory by separate package shortly after receipt of said report. The report was considered by Clark and the Carroll County Sheriff to be inconclusive, particularly in view of the fact that Mrs. Hilliard herself was taking the position (and did in fact testify at the trial) that the spots upon the jacket might consist of hog blood. Clark on or about April 28, 1970, forwarded the curtains and jacket to the Nashville Office of the Tennessee Bureau of Criminal Identification to be in turn forwarded to the F.B.I. laboratory in Washington for further analysis.

6. A preliminary hearing was afforded the accused on February 27, 1970, in the General Sessions Court of Carroll County, Tennessee, at which time there was evidenced the jacket of the accused, along with certain curtains taken from the home of the victim. The defendant, Clark, stated during or after the hearing that he would submit both the jacket of the accused and the curtains to a laboratory for examination and analysis to determine if blood were present. There was disagreement as to whether Clark, employed by the

Tennessee Bureau of Criminal Investigation, also agreed at the same time to inform counsel for the accused when such a report had been returned to him. In any event, Clark did not agree to release the contents of the report when received. The defendant, John L. Williams, actively participated in this preliminary hearing as the prosecuting attorney, after which Hilliard was called upon to stand trial before a jury in the Carroll County Circuit Court.

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7. Prior to the date of the first criminal trial of the accused, the defendant, Donn Clark, discussed the F.B.I. laboratory report of March 26, 1970, with the defendant, John L. Williams, though he did not show it to Williams. The first such brief discussion occurred in the Carroll County Courthouse shortly after the receipt of the report, and included both defendants and Donald Akin, the Sheriff of Carroll County, Tennessee. Another discussion occurred just before the first criminal trial of the accused when the defendant, Donn Clark, went to the office of the defendant, John L. Williams, with his investigative file to discuss, among other things, whether the report of March 26, 1970, would have to be produced at the trial.

8. Mrs. Hilliard was arraigned on May 8, 1970, at which time the trial date of May 12 was set. At the time of the trial the jacket was in the Nashville Office of the Tennessee Bureau of Identification, although Clark believed that it had been forwarded to the F.B.I. laboratory in Washington. The curtains were forwarded to the F.B.I. laboratory, but for some reason not clear from the record, the jacket was not forwarded, but remained in Nashville, unknown to Clark and Williams.

9. Prior to the commencement of the first criminal trial of the accused, defendant, John L. Williams, instructed the other defendant, Donn Clark, who was to be a witness not to bring up this report unless it were specifically called for.

10. Testimony was elicited on the first trial of the accused from the defendant, Donn Clark, and the State's witness, Donald Akin, the Sheriff of Carroll County, to the effect that in their opinion there were spots on both the jacket of the accused

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and the curtains that "looked like" and/or "appeared to be" blood.

11. There was other testimony by the defendant, Donn Clark, and the State's witness, Donald Akin, the Sheriff of Carroll County, in the first criminal trial that was misleading and evasive as to the existence or availability of any report of the examination or analysis of the jacket of the accused, or the curtains, or as to the return of the jacket and curtains from the F.B.I. laboratory. No specific question was asked about any such report indicating negative as to existence of human blood. [2]

12. At the 1970 trial, Clark and Sheriff Donald Akin of Carroll County testified in substance that the jacket had spots on it which appeared to be blood. Mrs. Hilliard likewise testified at the first trial that the jacket had spots on it which might be blood, but were hog blood.

13. After trial and sentencing of Mrs. Hilliard, the F.B.I. laboratory reported on or about May 28, 1970, that

[2] See attachment hereto as footnote No. 2.

the stains on the curtains had been analyzed and found not to be blood but rather a varnish stain.

14. Pending the appeal of the first criminal trial to the Tennessee Criminal Court of Appeals, requests were made of both defendants by Mrs. Hilliard's counsel as to whether any report of the analysis of the jacket and curtains had yet been received by the prosecution. A negative response was indicated. A written motion seeking the production of any analysis report, when and if received, as well as the jacket and the curtains themselves, was filed on August 3, 1970, in the Tennessee Court of Criminal Appeals and a copy forwarded to the defendant, John L. Williams.

15. The Tennessee Court of Criminal Appeals in a

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written opinion on April 15, 1971, reversed the conviction of the accused purportedly on the grounds that the circumstantial evidence adduced at the first criminal trial did not conclusively prove guilt and exclude all reasonable hypotheses of innocence as the law required. The Court further, however, noted that the testimony elicited from the State's witnesses at the first trial to the effect that the stains on the jacket of the accused were blood, was of "devastating impact tending to show guilt;" "that the jacket itself was by State action unavailable;" and, that there was not "any information available to shed light on the vital issue of whether the blood was human, as theorized by the State, or hog, as theorized by Hilliard."

16. On or about April 20, 1971, after the opinion of the Tennessee Court of Criminal Appeals was released, the defendant, John L. Williams, appeared in open Court and delivered the jacket of the accused and copies of all

correspondence and reports between the prosecution and the F.B.I. laboratory to counsel for the accused.

17. On May 12, 1971, the second trial of the accused commenced in the Circuit Court of Carroll County, and concluded in an acquittal on May 13, 1971.

18. There was a substantial amount of circumstantial evidence presented at the first (May 1970) trial entirely apart from the curtains or the jacket strongly indicating the guilt of Mrs. Hilliard, including the following matters:

a. Mrs. Hilliard had a motive to kill since she was involved in a serious dispute with the deceased.

b. Just before the homicide the deceased and

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Mrs. Hilliard were engaged in a controversy of such gravity (according to the testimony of Mrs. Hilliard) that the deceased threatened and chased Mrs. Hilliard with a shotgun.

c. Mrs. Hilliard's shoe was found a few feet from the body of Ernie Price and when she arrived at the Nesbitt house one of her shoes was missing.

d. Following Mrs. Hilliard's flight to the Nesbitt home, she contacted her lawyer almost immediately.

e. Mrs. Hilliard's behavior and demeanor, following her flight from the Price home, indicated that she knew both that Ernie Price was dead, and the whereabouts of his body.

f. The evidence indicates and counsel for all parties concede that the murder was either committed by Vina Price, the widow, or Mrs. Hilliard. Mrs. Price was

a person mentally weak if not totally incompetent; the murder was committed by a person of some physical strength, and Mrs. Price was elderly and feeble. Mrs. Price had no motive for killing her husband, and had lived with him for many years without ever attempting to harm him.

g. Mrs. Hilliard gave testimony at the trial to the effect that when she fled the Price home, that Mrs. Price was in the house; however, the children of Ernie Price testified at the trial that Mrs. Hilliard told them an inconsistent version that when she fled the house Mrs. Price was not in the house, but out by "the old house place," some several hundred yards away.

19. The evidence presented at the second trial was substantially different from that presented at the first trial in several significant particulars:

a. Certain rather gruesome photographs, including

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those of the body, which were exhibited to the jurors at the first trial, were not so exhibited at the second trial.

b. The family of Ernie Price did not appear nor render support to the prosecution case at the second trial as at the first trial.

c. The sons of Ernie Price did not testify at the second trial as they did at the first trial to the effect that Mrs. Hilliard had made certain conflicting statements to them concerning the whereabouts of Vina Price at the time Mrs. Hilliard fled the Price home.

d. At the second trial, Mrs. Hilliard testified that the jacket had no blood on it but that if it did have blood

on it, it was hog blood, whereas she testified at the first trial to the effect that the jacket did have hog blood on it. (In effect, she then had the benefit of the report).

20. At no time did Mrs. Hilliard or her counsel make an effort to have the Court set bond or to make bond though she claimed to own an interest in a seventy (70) acre tract of land in Carroll County, Tennessee, (conveyed to her counsel to be applied on his fee).

21. Prior to the trial of May 1970, counsel for Mrs. Hilliard took no legal steps aimed at discovering the results of any test that may have been carried out in connection with the jacket or the curtains, though he knew that the items were being submitted for analysis; and he made no pre-trial formal or informal requests of either of the defendants in connection with the jacket or the curtain or any reports that may have been received upon them.

22. There is some question as to whether the F.B.I. report in and of itself would have been admissible as evidence in the absence of an F.B.I. laboratory technician personally.

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CONCLUSIONS

1. The rule of law prevailing in the State of Tennessee at the time of the first criminal trial concerning the weight and sufficiency of circumstantial evidence alone necessary to sustain a criminal conviction was that such circumstances must be consistent with guilt and inconsistent with innocence and must exclude every other reasonable hypothesis save the guilt of the criminally accused beyond a reasonable doubt. *Hicks v. State*, 490 S.W.2d 174; *Patterson v.*

State, 475 S.W.2d 201 and *Harris v. State*, 457 S.W.2d 370, *cert. denied*, 401 U.S. 978, 91 S.Ct. 1206, 28 L.Ed. 2d 328.

2. The defendant, John L. Williams, as District Attorney General of the 22nd Judicial Circuit, has the ultimate responsibility for the preparation and presentation of all criminal proceedings in the 22nd Judicial Circuit and this responsibility entails a two-fold duty in that he is to prosecute the guilty and protect the innocent. *Giles v. Maryland*, 386 U.S. 66, 87 S.Ct. 793, 197 L.Ed.2d 737; *Branch v. State*, 469 S.W.2d 533, 1969.

3. The defendant, John L. Williams, as District Attorney General, had an affirmative duty: (1) to disclose to the accused or her counsel material exculpatory evidence and any information favorable to the defense of the accused or which might be useful to the defense. *Giles v. Maryland, supra*; *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215; (2) to correct false or erroneous evidence when it appears in the trial of a criminal case. *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed. 2d 1217; and (3) to not take any advantage of an accused by preventing their access to testimony favorable to their case, or by any trick or fraud whatever, prevent an accused from learning of evidence favorable

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to their case. *Eason v. State*, 65 Tenn. 431 (1873); *Robert v. State*, 489 S.W.2d 263 (1972) (J. Dwyer's Dissent).

4. The defendant, John L. Williams, as District Attorney General, acted unwisely and improperly in failing to disclose to the accused or her counsel the substance of

the report as to blood examination. He was also negligent in not being aware that the testimony of certain State's witnesses upon the first criminal trial was misleading and evasive or else he acted improperly in this respect. He advised Donn Clark not to mention the report at the first criminal trial unless specifically called for, and thus, we conclude that Clark acted under "advice" of Counsel, Williams. See the canons of professional ethics: EC7-13, EC7-26, and EC7-27, and *Hilliard v. Williams*, 465 F.2d 1212 (6th Cir. 1972).

5. The defendant, Donn Clark, as an investigating agent for the State, was also under an affirmative duty to refrain from perjury and misleading or evasive testimony calculated to suppress evidence and/or to mislead the jury as to the significance of the spots on the jacket of the accused. He did not, however, in our judgment willfully and corruptly testify falsely so as to violate the perjury laws of Tennessee.

6. The plaintiff has failed to carry the burden of proving any conspiracy between the defendants Clark and Williams to suppress evidence, present perjured testimony, or in any way to deprive Mrs. Hilliard of any rights guaranteed her by the Constitution of the United States or any Federal Statute.

7. Neither of the defendants jointly or severally suppressed any evidence, committed or suborned perjury, or otherwise

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committed any act or were guilty of any omission which deprived Mrs. Hilliard of any rights guaranteed her by the Constitution of the United States or any Federal Statute.

8. It would amount to speculation and surmise for the Court to conclude that the absence (whether deliberate or otherwise) of the F.B.I. report of March 26, 1970, or the absence of the curtains and jacket, affected the outcome of the May, 1970, trial. There was considerable evidence to warrant a finding of guilty on the record in any event.

9. A substantial basis for the reversal by the Court of Criminal Appeals were the actions of the trial Judge with respect to admission of gruesome photographs and the matters pertaining to circumstances of the jacket, the curtains and the F.B.I. reports relative thereto which were brought to that Court's attention, at least by motion.

10. It would also be a matter of speculation and conjecture to conclude that the testimony given by defendant Clark at the May, 1970 trial effected its outcome insofar as the jacket and curtains are concerned.

11. The testimony given by defendant Clark at the May, 1970 trial must be considered in relation to that of Mrs. Hilliard and of Sheriff Donald Akin, with respect to whether or not there was human or animal blood, or otherwise, on the jacket.

12. Plaintiff has failed to show that any wrongful act of Clark or of Williams proximately and directly caused Mrs. Hilliard to be convicted of murder in the second degree at the May, 1970 trial or to suffer imprisonment on that account in view of other substantial variances in the proof adduced at the two trials.

[13]

13. During the proceedings in question defendant Williams was acting within the scope of his duties as Attorney General

and at no time did he go outside the scope of his duties as Attorney General in directing or commanding or ordering the investigating officers or witnesses to present false testimony. He was unwise and acted improperly in allowing the impression to be left that there was no F.B.I. report bearing upon the existence or non-existence of blood on the jacket or curtains (even though allegedly "inconclusive").

14. Defendant Williams did not deliberately or willfully suppress evidence. He knew about the first report, however, and should have revealed the substance of this to Hilliard or her attorney in light of all the circumstances, as it could well have been considered by the jury to have been exculpatory.

15. There was considerably more probative evidence pointing to the guilt of Hilliard beside the alleged blood stained jacket and curtains. Reasonable inferences could well have been drawn from all the proof and evidence, primarily circumstantial in nature, indicating that she had committed the vicious and brutal act in controversy.

16. The aged widow, Vina Price, might apparently have been produced at the first trial, though she was concedely feeble-minded and her competence was subject to question. Whether a year later her physical and mental condition or physical location would have made her available or of any assistance at a trial is not known.

17. Plaintiff has failed in her burden to prove that either defendant willfully either separately or by collusion or conspiracy prevented testimony favorable to the accused Hilliard or acted

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fraudulently in order to "frame" or unjustifiably attempt to convict the accused Hilliard. She has also failed in her burden to prove that the acts of the defendants, if and whether mistaken, negligent, or deceitful, were the direct and proximate cause of her conviction and confinement.

Under all the circumstances, plaintiff is awarded nominal damages of $1.00 as to both defendants, Clark and Williams, despite the failure to establish willful, deliberate and fraudulent concealment of evidence or perjury, and the failure to show that such mistaken or improper acts as and if involved on the part of either defendant were a direct and proximate cause of any imprisonment or damages.

Plaintiff's civil rights have not been demonstrated to have been violated by defendants in reasonable relationship to any showing of damages.

Costs of the cause are assessed against defendant Williams.

This 2nd day of November, 1973.

HARRY W. WELLFORD
UNITED STATES DISTRICT COURT JUDGE

Footnote [2] The following questions and answers were elicited from Clark: (pp. 51, 56, 63 and 64, Tr.)

Q 66	Did you proceed to inspect the living room furniture then?
A	Yes sir, I found what looked to be blood stains on the arm of the arm chair, on the north side of the house, sort of behind the stove, —
Q 67	All right, go ahead?
A	Also found blood stains on the floor in front of the chair, and some on the curtains behind the stove, then on the back of the couch on the north wall of the living room, the wall looked wet, as if it had been washed behind the couch there.
Q 110	Was that the way she was dressed when you took the picture of her?
A	Yes, that was made at the jail.
Q 111	What kind of coat is that?
A	A blue nylon windbreaker type coat.
Q 112	All right, did you find any blood stains on that?
A	Yes sir, I found some spots on it.
Q 113	What did they appear to be?
A	They appeared to be blood stains.
Q 114	Where were they?

A They were on the right tail of the coat, right front of the coat.

CROSS EXAMINATION OF DON CLARK, BY MR. MADDOX:

Q 59 Did you have the curtains analyzed?

A I sent them off to the F.B.I. lab and they aren't back yet.

Q 60 You don't have the curtains back?

A No sir.

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Q 61 Let's talk about this jacket, —you put in some very dangerous evidence against the defendant, by saying she had bloodstains on her jacket —do you know they were blood stains?

A I said they looked like blood stains.

Q 62 How large were they, Mr. Clark?

A They were small—

Q 70 Mr. Clark, where is that jacket today?

A At the F.B.I. lab in Washington.

Q 71 Why didn't you make it available here for us so that the jury could see those spots on that jacket and determine if it was blood?

A They just didn't send it back.

Q 72 Have you had any reports that there was human blood on that jacket?

A No, not at this time.

Q 73 But you don't know what was on that jacket do you?

A No, just what it looks like, —

Q 75 Do you know if that was blood stains or not?

A Not through a chemical analysis I wouldn't know, —

Q 76 So you do not know?

A No sir, I don't.

The following were elicited from Sheriff Akin (pp. 114, 116, 117 and 118, Tr.):

Q 1 Did you take any scrapings off the spot that you saw in there that you have identified as blood spots?

A No sir, I did not.

Q 2 Do you know what that spot was?

A It looked to me like it was blood.

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Q 3 Do you know?

A No sir, —

Q 4 You have no laboratory report telling you what it is?

A No sir, and I still wouldn't know if they gave me a report, —but it looked like blood.

Q 6 All right, just describe this jacket that Onie Lee was wearing?

A There was blood spots on the right side of the jacket.

Q 7 They appeared to be blood stains to you?

A Yes sir.

RE-CROSS EXAMINATION BY MR. MADDOX:

Q 1 Where is that jacket today?

A Mr. Clark sent it to the F.B.I.

Q 2 Why don't you have it here to show this jury, so they can look at those spots, and see as to whether or not they were blood or not?

A It hasn't come back, —sometimes things get delayed, Mr. Maddox, we wanted it back,— but we didn't get it back.

Q 7 Now, Sheriff, I challenge that statement— I challenge you to get that jacket, —

Gen. Williams: Your Honor, please, I am going to object to that, —he has explained that the jacket has gone to Washington and hasn't got back, —we have no control, —

Mr. Maddox: Your Honor, at this time I am going to ask

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for a continuance of this trial until that jacket gets back, —I think it is most material evidence in this case, —I have seen the jacket and I know what the evidence is, —

The Court: If you have seen the jacket you can testify here, as to what you have seen, —no I am not going to continue this case.

Mr. Maddox: Your Honor, please, I believe it is most prejudicial to, —this defendant, — it is opinion evidence and is not admissible in the first place, —

The Court: Well, he can testify as to what he saw and you can testify as to what you saw, —

Mr. Maddox: Your Honor is not going to put me in a position to have to testify in a case that I am trying, —

The Court: If you saw it and desire to do so I am going to let you do so, —I am not going to continue this case, —

Mr. Maddox: Apparently the State, Your Honor, please is hiding some evidence somewhere, —

Mr. Lassiter: If the Court please, I object to that statement, —I ask the Court to instruct the jury that this is, —

The Court: Gentlemen, lets disregard that last remark, —that is something that you can argue to the jury if you want to.